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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/829,518	04/22/2004	Duane G. Krzysik	KCC 4980 (K-C 19,319)	7372
321	7590	09/11/2007	EXAMINER	
SENNIGER POWERS			OGDEN JR, NECHOLUS	
ONE METROPOLITAN SQUARE				
16TH FLOOR			ART UNIT	
ST LOUIS, MO 63102			PAPER NUMBER	
			1751	
			NOTIFICATION DATE	
			DELIVERY MODE	
			09/11/2007	
			ELECTRONIC	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

uspatents@senniger.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/829,518	<b>Applicant(s)</b> KRZYSIK ET AL.	
	<b>Examiner</b> Necholus Ogden	<b>Art Unit</b> 1751	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 July 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20, 22-40 and 42-56 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20, 22-40, 42-56 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 7-11-2007 has been entered.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein

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were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

1. Claims 1-7, 10-18, 22-27, 30-38, 42-47 and 51-54 are rejected under 35 U.S.C. 103(a) as obvious over Tsauro (6,126,954).

Tsauro discloses a skin cleansing composition comprising 5 to 45% by weight of a surfactant such as anionic, amphoteric, nonionic and mixtures thereof; 1 to 30% by weight of a skin benefit agent having a particle size of 1 to 200 micrometers; 1 to 30% by weight of another skin benefit agent (col. 3, lines 17-39). Tsauro teaches that said anionic surfactant includes alkyl sulfates, alkyl ether sulfates and acyl isethionates (col. 4, lines 10-61) and said amphoteric surfactants include betaines and sulfobetaines (col. 5, lines 5-67). The benefit agents disclosed in Tsauro include fats and oils such as avocado and coconut, silicone oils such as polydimethylsiloxane; esters, lipids such as ceramides and cholesterol and mixtures thereof (col. 7, lines 10-61). Note, Tsauro teaches that said pre-dispersion compositions having a viscosity less than 100,000 centipoise (col. 6, lines 21-50).

As this reference teaches all of the instantly required it is considered anticipatory.

Alternatively, if the above listed claims do not anticipated the claimed invention, it would have nonetheless been obvious to one of ordinary skill in the art to combine the

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components to specifically teach the claimed invention, absent a showing to the contrary.

2. Claims 8-9, 28-29, 48-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsaur (6,126,954) in view of WO 01/19949.

Tsaur is relied upon as set forth above. Specifically, Tsaur does not teach applicant's specific amphoteric and zwitterionic surfactants.

WO '949 disclose a liquid cleansing composition comprising at least one anionic, amphoteric and zwitterionic surfactant; one lamellar structurant and optionally one nonionic and/or cationic surfactant. With respect to the amphoteric and zwitterionic surfactants, WO '949 teaches that said surfactants include acylamphopropionates and 4-[N,N-di (2-hydroxyethyl)-N-octadecylammonio]-butane-1-carboxylate (pages 14-18). Furthermore, WO '949 teaches the inclusion of adjunct materials such as titanium dioxide as a coloring agent.

It would have been obvious to one of ordinary skill in the liquid cleansing art to include additional amphoteric and/or zwitterionic surfactants to the compositions of Tsaur because said surfactants are well known to enhance moisturizing properties to the skin.

3. Claims 19-20, 39-40 and 55-56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsaur (6,126,954) in view of Barry et al (3,829,563).

Tsaur is relied upon as set forth above. Specifically, Tsaur does not specifically disclose applicant's specific surfactants having an HLB value of from 4-8.

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Barry et al disclose a skin cleansing composition comprising surfactants such as anionic, amphoteric and 1 to 10% by weight of an emulsifiers having an HLB value of from 1 to 6 and including sorbitan fatty acid esters and polyoxyethylene-2-oleyl ether (col. 4, lines 51-col. 5, line 15).

It would have been obvious to one of ordinary skill in the liquid cleansing art to include the emulsifier/surfactants of Barry et al to the compositions of Tsaur because said emulsifiers/surfactants are well known nonionic surfactants used in cleansing formulations and Tsaur invites the inclusion of nonionic surfactants. Therefore, one of ordinary skill in the art would have been motivated to include said emulsifiers/surfactants, absent a showing to the contrary.

#### ***Response to Arguments***

4. Applicant's arguments filed 7-11-2007 have been fully considered but they are not persuasive.

Applicant argues that Tsaur does not disclose compositions comprising a lamellar phase and that there is not suggestion in Tsaur to form said phase.

The examiner contends lamellar phase, by definition, means forming a thin layer or plate, wherein it would have been obvious to the compositions of Tsaur to comprise a lamellar phase or to form thin layers or plates given that Tsaur teach compositions with varying viscosities and that form dispersions or particles. Therefore, the compositions of Tsaur would encompass the lamellar phase in the absence of a showing to the contrary. Accordingly, applicant has not shown any evidence to the contrary on

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attorney arguments, which are not supported by factual evidence commensurate in scope with the claimed invention.

*The arguments of counsel cannot take the place of evidence in the record. In re Schulze, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965); In re Geisler, 116 F.3d 1465, 43 USPQ2d 1362 (Fed. Cir. 1997) ("An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a prima facie case of obviousness.").*

Applicant argues that Tsaur does not disclose 1 to 5% by weight of a sterol.

The examiner contends and respectfully disagrees and directs applicant's attention to column 7, line 48 and col. 8, line 1-10 of Tsaur, which specifically teach that said compositions comprise cholesterol as a benefit agent in the amount of 1 to 30% by weight.

Applicant argues that Tsaur et al do not teach or suggest microencapsulating sunscreen, skin protectant and components of lipid phase.

The examiner contends that Tsaur et al is silent with respect microencapsulating said skin protectant, sunscreen additive or components in the lipid phase, however, it would have been with the purview of the artisan of ordinary skill to expect the aforementioned ingredients in an emulsified composition to comprise molecules that are encapsulated. Furthermore, the examiner assumes that the compositions of the present invention are mixed and heated which would further break down any form of microencapsulation in the final product, in the absence of a showing to the contrary. Accordingly, with respect to choosing the sterol component in the lipid phase, the

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examiner contends that it is held "a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that the combination was obvious to try might show that it was obvious under 103." KSR, 550 U.S. \_\_\_, 82 USPQ 2<sup>nd</sup> 1397.

*An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not. See KSR Int'l Co. v. Teleflex Inc., 550 U.S. \_\_\_, 2007 WL 1237837, at \*12 (2007) ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.").*

Applicant argues that Tsaur teaches only a pre-dispersion viscosity and not the final viscosity of 10,000 cps to 200,000 cps.

The examiner contends that Tsaur is silent with an exact final viscosity of the final personal cleansing product, however, one of ordinary skill in the art, in the absence of a showing to the contrary would expect the final composition to increase in viscosity given that the dispersion ingredients suggested by Tsaur would increase the final composition to limits beyond the less than 100,000 cps pre-dispersion range as suggested by Tsaur since the ingredients suggested in dispersions, cationic polymers, would appear to further increase the solutions viscosity and add to the final form of an emulsified compositions as suggested by Tsaur.



Applicant argues that Tsaur does not suggest that stability of the composition can be achieved.

The examiner contends that the motivation or suggestion does not have to be applicant's "problem to be solved".

The reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem. It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by applicant. See, e.g., *In re Kahn*, 441 F.3d 977, 987, 78 USPQ2d 1329, 1336 (Fed.Cir. 2006).

Applicant argues that there is no motivation to combine Tsaur and Mitra and that the structuring agent is not defined in Tsaur.

The examiner contends that Tsaur and Mitra are analogous art with the inclusion of same components well known in the personal cleansing art. Therefore, many components taught by Tsaur may be considered "structurants" to form said phases in the absence of a showing to the contrary. Moreover, Mitra is relied upon to show the equivalence of specific amphoteric and zwitterionic surfactants. Therefore, in the absence of unexpected results, it would have been obvious to try known ingredients when the results would have yielded predictable results.

With respect to arguments that Barry et al do not exhibit a lamellar phase, the examiner contends that Barry et al is relied upon only to show the use of specific surfactants with HLB values as claimed are well known in the cleansing art. Moreover, applicant has not provided any evidence to the contrary that would suggest that Barry

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would not provide a lamellar phase, commensurate in scope with the claims.

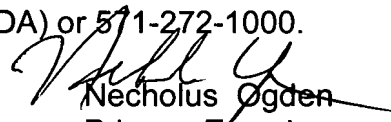
Accordingly, the prior art of record are analogous art and should be combined for their intended purpose.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholus Ogden whose telephone number is 571-272-1322. The examiner can normally be reached on M-Thu.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on 571-272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Necholus Ogden  
Primary Examiner  
Art Unit 1751

